Before the
FEDERAL COMMUNICATIONS COMMISSIO
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

EXECUTIVE SUMMARY OF INITIAL COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO (PHASE I)

The Public Utilities Commission of Ohio (PUCO) respectfully submits that the Federal Communications Commission (FCC) should substantially reconsider the tentative approach outlined in this Notice of Proposed Rulemaking (NPRM). Instead of adopting the one-size-fits-all approach embraced in the NPRM, the FCC should pursue a more cooperative joint regulatory approach to effectively and efficiently promote local competition with the help of the states. An approach allowing for flexibility and discretion would better conform to the substantial role for states envisioned by Congress. In enacting the 1996 Telecommunications Act, (1996 Act) Congress affirmatively chose not to amend 47 U.S.C. § 152(b), which expressly limits the FCC's jurisdiction to interstate telecommunication issues and expressly reserves intrastate jurisdiction to the states. In contrast to the NPRM, the 1996 Act provides a specific and limited standard for the preemption of state interconnection regulations that are inconsistent with the Act. Section 251(d)(3). The regulatory model advocated by Ohio would diffuse the preemption conflict set up by the NPRM.

Ohio's approach still involves the FCC promulgating national standards, but those standards would be subject to the following three-tiered approach. First, the FCC would refrain from issuing detailed regulations where the plain obligations and requirements of the 1996 Act are sufficient. An example of this is the obligation of incumbent local exchange companies (ILECs) to engage in good faith negotiations under Section 251(c)(1). The second tier would involve general guidelines or minimal regulations issued by the FCC, such that states can impose additional requirements consistent with the FCC's general regulations. This tier would include, for example, the establishing of a minimum set of network elements that must be unbundled.

The third tier of regulations would involve more specific FCC regulations, but those regulations would be more limited in effect and purpose. In particular, the specific FCC regulations would serve as a voluntary model for the states that have not yet adopted specific rules by the time this NPRM is decided. In other words, at the time of the NPRM decision, those states who have already promulgated rules that are consistent with the 1996 Act will effectively be grandfathered. This element is critical because it will operate to preserve the substantial progress made by states in fostering local competition, consistent with the 1996 Act. Those states who have not implemented such rules could use the FCC's model and be required to implement their own regulations by a certain date. Alternatively, those states lagging behind at that point would have to simply adopt or comply with the specific FCC rules. As an additional benefit of the third tier specific regulations ILECs and other parties would receive advanced notice of the FCC's specific methodology to be utilized if states fail to act, pursuant to Section 252(e)(5).

The PUCO firmly believes that the Ohio regulatory model would be the most productive, efficient, and cooperative approach for the FCC to implement. It would avoid undermining the substantial progress already made by states like Ohio, and would allow states to craft tailor-made approaches (consistent with the 1996 Act and the FCC's general guidelines) that will more effectively incorporate the varying technical, geographic and demographic circumstances present in each state. Finally, relative to pricing methodologies in particular, the Ohio model would allow states to set rates in accordance with their varying ratemaking methodologies and legal parameters governing each state.

While the PUCO believes that the above-described regulatory model is the best approach, Ohio would like to also present alternative recommendations to consider if the FCC should forge ahead with a comprehensive set of specific regulations. Given the imminent issuance of the PUCO's final rules on local competition, the PUCO has not yet finalized its approach to some of the technical issues. Accordingly, the following specific technical recommendations in Ohio's comments reflect the current thinking of the PUCO Staff. The PUCO plans to submit Ohio's final rules as a late-filed exhibit in this NPRM.

The PUCO Staff maintains that the authority to determine the technical points of interconnection should rest with the states, since states will continue to be aware of technology deployed in their jurisdictions as well as the evolution of technically feasible points of interconnection as network unbundling proceeds. Likewise, the PUCO Staff recommends that the installation, maintenance, repair, and testing of incumbent local exchange carriers' (ILECs') interconnection facilities be subject to individual state's minimum telephone service standards, and at a minimum to the

recommendations endorsed by the Network Reliability Counsel (NRC) II in its "Bilateral Agreement Template for Network Interconnection."

As it concerns collocation of interconnectors' facilities, the PUCO Staff maintains that Ohio, and many other states, are capable to review thoroughly the facts and circumstances to determine if a carrier must provide physical collocation in accordance with Sections 251(c)(6) of the 1996 Act.

The PUCO Staff submits that, regarding the unbundling of network elements, the FCC adopt an approach requiring LECs to unbundle any technically feasible network element only upon a bona fide request. The PUCO Staff further believes that, while national minimum guidelines may be appropriate, any guidelines that prevent states from imposing reasonable additional requirements would be in violation of Section 252(e)(3) of the 1996 Act. In addition, the PUCO Staff notes that the NPRM fails to cite specific language from the 1996 Act that expressly provides the FCC with the authority to establish pricing standards for interconnection, collocation, and unbundled network elements. Should the FCC establish pricing guidelines (arguendo) for these services, the PUCO contends that prices should be set at a level that allows the providing carrier to recover its long run service incremental cost (LRSIC) for the service, as well as joint costs and a reasonable contribution to common overhead.

Regarding the ILECs' obligation to provide resale of services at wholesale rates, consistent with the 1996 Act, the PUCO believes that ILECs are required to make available to other telecommunications carriers all services available in the retail-priced, end user tariff. An ILEC proposal to remove a service from its retail tariff should be subject to the approval of the state commission. Any cost incurred by an ILEC to provide a wholesale service should be included in the calculation of the net avoided cost. The

PUCO concurs with the FCC proposed requirement that ILECs neither prohibit nor impose unreasonable and/or discriminatory conditions nor limitations on the resale of its tariffed services. As it concerns the pricing of wholesale tariffs, the PUCO maintains that the FCC should establish minimum guidelines for determining retail avoided cost. Moreover, States should be afforded, at their discretion, the flexibility to enhance those guidelines.

The PUCO recommends that the individual states establish the ceiling for prices for the transport and termination of local traffic. Additionally, the PUCO recommends that states be permitted to set price floors for reciprocal compensation that incorporate a reasonable level of contribution to common costs. Finally, as it concerns the state arbitration process, the PUCO recommends that the FCC refrain from establishing principles for rate symmetry of transport and terminating traffic.

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INITIAL COMMENTS OF
THE PUBLIC UTILITIES COMMISSION OF OHIO
(PHASE I)

I. INTRODUCTION AND OVERVIEW[1]

A. Background

The Public Utilities Commission of Ohio (PUCO) hereby submits its initial comments pursuant to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking ("NPRM") in CC Docket No. 96-98 (In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996). Specifically, the FCC's NPRM in this investigation proposes rules to implement portions of Sections 251, 252, and 253 of the Telecommunications Act of 1996, P.L. 104-104 (S. 652) (1996 Act).

By way of these comments, the PUCO submits its recommendations to the FCC concerning Federal-State jurisdictional issues and the unduly prescriptive nature of the NPRM's proposed rules. The PUCO also provides the FCC, in these comments, with its recommendation on certain technical issues including, but not limited to, incumbent local exchange companies' (LECs') obligation to interconnect with other LECs, resale, unbundled

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1 These comments are organized and presented under the same outline utilized in the NPRM, with specific paragraph references where appropriate.

network elements and reciprocal compensation. Comments regarding the "Phase I issues" under this NPRM are due at the FCC on or before May 16, 1996.

B. Overview of Sections 251, 252, and 253

Section 251 of the 1996 Act requires all telecommunications carriers to interconnect and imposes specific obligations upon Local Exchange Carriers (LECs) and Incumbent Local Exchange Carriers (ILECs) to open their networks to the new entrants. Section 251(c) of the 1996 Act requires LECs to make available to new entrants interconnection and unbundled network elements. Furthermore, Section 251(c) requires ILECs to offer to telecommunications providers retail services at wholesale rates. Section 251(b) of the 1996 Act requires all LECs to offer resale, number portability, dialing parity, and access to rights-of-way, and to establish reciprocal compensation arrangements for transport and interconnection.

Section 252 of the 1996 Act imposes certain responsibilities upon the FCC should a state fail to resolve interconnection disputes between LECs. Section 253 of the 1996 Act prohibits the states from affirmatively prohibiting competitive entry into the local telecommunications market and authorizes the FCC to preempt states that attempt to prohibit such competitive entry.

II. PROVISIONS OF SECTION 251

A. Scope of Commission's Regulations (¶¶ 25-41)

The FCC, in interpreting Section 251, reaches two key conclusions with respect to the scope of its interconnection regulations. First, the FCC suggests that the adoption of explicit national rules would be the most constructive approach to furthering Congress' pro-competitive, deregulatory goals relative to telecommunications. Second, the FCC concludes as a legal matter that

Sections 251 and 252 apply to both interstate and intrastate aspects of telecommunication services and network elements. The PUCO submits that both of these conclusions are overbroad and unnecessarily intrusive upon the interests of States, in violation of the letter and spirit of the 1996 Act. The 1996 Act does not confer intrastate jurisdiction upon the FCC and does not curtail state authority over intrastate issues. Therefore, the FCC should adopt an approach that promotes the cooperative regulatory approach envisioned by Congress and respects the jurisdictional limit of the FCC found in 47 U.S.C. § 152(b).

Instead, the FCC should modify the NPRM to better promote the cooperative regulatory paradigm envisioned by Congress in passing the 1996 Act. Such an approach would reserve a reasonable range of flexibility for states in the arbitration and decision functions contemplated under Sections 251 and 252. By contrast, the NPRM's tentative approach stages an unnecessary legal preemption conflict that will cause confusion and delay, at a minimum, and could adversely affect and detract from the cooperative and complementary dual regulation intended by the 1996 Act. The approach advocated by Ohio would better achieve the 1996 Act's dual regulatory approach by reserving a meaningful and necessary role for states as the express terms of the 1996 Act require. Ohio's approach would also preserve the substantial work already done by states in promoting local competition, while ensuring state compliance with the 1996 Act and a broader set of FCC guidelines governing interconnection and unbundling.[2]

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[2] The PUCO has long promoted competition in the telecommunications industry in Ohio. For example, in Docket Nos. 84-944-TP-COI and 89-563-TP-COI, the PUCO adopted streamlined regulatory requirements that foster competition to the extent possible under Ohio law at that time. More recently, Ohio has aggressively pursued opening the local market to competition, by the pending rulemaking in Docket No. 95-845-TP-COI. In fact, the PUCO, within the next few weeks, will finalize the set of rules that will comprehensively address local competition in Ohio. Given that the FCC will not rule in

In particular, under the regulatory paradigm advocated by Ohio, the FCC would exercise substantial deference toward the states that have developed rules for local competition. The rules in each state could vary, subject to compliance with a broader set of guidelines that are directly related to the statutory goals and requirements of the 1996 Act. In some cases, the FCC should simply refrain from issuing guidelines where the basic obligations and requirements under the 1996 Act are clear. Further, the states that have made substantial progress by the time the FCC issues a decision in this NPRM would be ensured that their efforts, to the extent that they are consistent with the 1996 Act, are not in vain. State access and interconnection regulations existing at the time this NPRM is decided could be "grandfathered" provided they are not inconsistent with the 1996 Act. Specifically, the FCC would only preempt state guidelines to the extent the state requirements: (a) are in inconsistent with Section 251; and (b) substantially prevent implementation the requirements of Section 251. That limited preemption approach is precisely in accord with Section 251(d)(3) of the 1996 Act.

With respect to states that have not made such progress, any specific guidelines issued in this NPRM could serve as a voluntary model to be utilized in establishing state interconnection requirements. A permeation of this approach is that such laggard states would be affirmatively required to follow the FCC's specific guidelines if they do not establish their own guidelines by a certain date. In any case, the FCC should allow a state to demonstrate compelling circumstances that have caused delay or inability to

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this docket until on or before August 8, 1996, the FCC's rules (particularly if adopted in the current form proposed by the NPRM) could conflict with and undermine both the historical and more recent progress made in Ohio with respect to local competition.

comply with such a cutover date, thereby justifying additional time for that state to comply. The FCC's specific guidelines (subject to applicable state laws as explained below) would also govern any decisions that would be made by the FCC where states fail to act under Section 252(e)(5) and, in that regard, would also serve to notify ILECs and others of the FCC's adopted methods.

In addition to preserving, rather than undermining, progress made by states in promoting local competition, Ohio's recommended approach would prospectively recognize the legitimate differences among states relative to technological, geographical demographical conditions within each state. Interconnecting carriers like Time Warner, who have extensive local network facilities in place but are without substantial interexchange facilities, will have varying interconnection needs as compared with a large IXCs such as AT&T, who has extensive interexchange facilities but is without local network facilities. In addition, there are other local issues that have a direct bearing on interconnection issues.

For example, in Ohio, local calling area issues are prominent in rural communities and competition may be slower in coming to those areas, thereby requiring a different interconnection approach as compared to dense metropolitan areas such as Columbus and Cleveland. In short, the benefits in crafting national guidelines (as opposed to specific national rules) outweigh the costs associated with the lack of complete nationwide uniformity. More to the point, Ohio's advocated regulatory model of reserving state flexibility and discretion will produce tailor-made solutions to promote competition in a timely fashion, while simultaneously ensuring compliance with the requirements and policies found in the 1996 Act.

In addressing the proper scope of the FCC's rules, as raised in the NPRM, Ohio will next address the overall policy issues implicated by the

NPRM, and then will discuss the important legal issues presented. The NPRM concludes that Congress clearly intended for the FCC "to implement a pro-competitive, de-regulatory, national policy framework" under the 1996 Act. NPRM at ¶ 26. The FCC suggested that it would proceed "with due regard to work already done by the states" and would formulate an approach that would "preserve broad discretion for states." NPRM at ¶¶ 26-27. However, the NPRM goes on to conclude that detailed national uniform rules are contemplated and required under nearly every major provision of the 1996 Act.

In particular, the FCC tentatively concludes that it should establish uniform national interconnection rules to "facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements." NPRM at ¶ 50. Likewise, the FCC concludes that it should establish national rules for collocation and minimum requirements for unbundling. NPRM at ¶¶ 50, 77. The FCC also asserts that it has authority to establish national requirements for the pricing of interconnection, collocation and unbundling, including the resale requirement for wholesale rates. NPRM at ¶ 117. In short, the FCC's approach leaves little discretion or flexibility for the states, yet requires states to do "the heavy lifting" by implementing all of these mandates. The PUCO submits that the FCC should reconsider its tentative conclusion that the 1996 Act requires broad federal preemption in order to foster competition.

One of the justifications used in the NPRM for employing uniform national rules is to "guide states that have not yet adopted the competitive paradigm of the 1996 Act." NPRM at ¶ 28. The goal of motivating certain states, however, does not justify the broad preemptive approach taken in the NPRM. The fact is that each state will either complete the arbitration

functions delineated under the 1996 Act, or will be subject to the FCC assuming jurisdiction over such matters. Having specific standards prescribed for them will not motivate states to take action any quicker or with any additional fervor. If anything, being faced with limited discretion and flexibility would discourage and frustrate state efforts, particularly if the work already done by many states is undone by this NPRM.

In this regard, the FCC concludes that their approach "would not necessarily undermine the initiatives undertaken by various states prior to the enactment of the 1996 Act, and in fact, we anticipate that we will build upon actions some state have taken to address interconnection and other issues related to opening local markets to competition." NPRM at ¶ 29. However, the FCC goes on to say that it may select a particular state's approach to serve as a model or will select certain parts of several states' approaches to employ a hybrid model. *Id.* This approach does "necessarily undermine" the initiatives taken by all but the "selected" state (or all but the portions of the "selected" states under the hybrid approach). Consequently, in all but those "selected" states, such a preemptive approach would set back progress and cause additional delay and regulatory expense.[3]

For example, with respect to Section 252 interconnection negotiations, the NPRM suggests that "[b]y narrowing the range of permissible results, concrete national standards would limit the effect of the incumbent's

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[3] It is undisputed that a change in established regulatory requirements will cause delay and additional regulatory burden. The FCC engages in broad speculation when it argues that variation among states in *new* regulatory requirements will intrinsically cause additional expense and reduced interoperability. NPRM at ¶ 30. A variation in requirements alone does not translate into additional expense or regulatory burden. Such variations among state regulations have existed since the initiation of Federal Telecommunications regulation, and have been taken into account by the investment community. The healthy returns earned by both the ILEC and the major new entrants indicate that the markets internalization of any such costs has not inhibited investment.

bargaining position on the outcome of the negotiations." NPRM at ¶ 32. Aside from the obvious contradiction in terms associated with such "specific guidelines," the effect of this interpretation is to substantially diminish the role for states envisioned in Section 252. This interpretation also severely curtails the negotiation process between carriers that would otherwise serve to produce a tailored outcome suited to the particular needs of the involved carriers. After all, the first course of actions envisioned by Section 252 is "voluntary negotiations." Congress provided for flexibility and contemplated the same variations which the NPRM views negatively. If all of the terms and conditions are fixed, any so-called negotiations would be a farce.

With respect to arbitration under Section 252, the NPRM's stated goal of "narrowing the range of permissible results" diminishes the role for states and the related discretion and flexibility inherent in effectively presiding over such disputes. For example, with respect to setting the rates for interconnection and unbundling, the FCC's tentative approach unduly restricts the role reserved by Section 252 for states to "establish any rates for interconnection, services, or network elements." However, Congress only limited the state's role of establishing rates by requiring that rates be nondiscriminatory and cost-based, also allowing an element of profit. Sections 252(c)(2), and 252(d)(1) of the 1996 Act. The issue of pricing standards will be further discussed in these comments.

The NPRM next speculates that states might not complete the timetable for arbitration unless the FCC promulgates specific and rigid standards. NPRM at ¶ 33 (assuming that the lack of specific rules would necessarily sacrifice the swift introduction of competition). *See also,* NPRM at ¶¶ 219, 238. This argument is a "red herring." States can, and have been, developing their own standards for interconnection, collocation and

unbundling. As stated above in footnote two, Ohio has nearly completed its comprehensive local competition rules as while the FCC is just initiating its NPRM. Other states have had comprehensive rules in place for some time. The displacement of these state regulations will, in fact, cause delay, confusion, uncertainty, and unnecessary regulatory conflict. States are entirely capable of refining and applying their own specific standards within the reasonable time frame established by Congress. If the 1996 Act really envisioned that the states would merely apply rigid standards dictated by the FCC, it surely would not have given the states a nine-month time frame to process each case.

Even without regard to the substantial work already done in states like Ohio to foster telecommunications competition, the 1996 Act contemplates variations in regulatory requirements among states and articulates a clear tolerance for variance within the confines of promoting competition. The FCC should acknowledge, not ignore, the fact that states have differing needs, and recognize that states will have to grapple with varying demographic, geographic and technical, and regulatory conditions that are present in their respective states. The prospect of a totally uniform national policy on local competition, although appealing by its sheer simplicity, is flawed for the same reason -- it is *too* simplistic. In reality, the 50 states have evolved through different regulatory systems and have developed based upon varying needs. Although the 1996 Act does establish broad parameters and uniform goals for the nation to jointly aspire toward, this NPRM seeks to implement them in a way that substantially diminishes the regulatory role preserved by Congress for the states. The 1996 Act does not dictate or even contemplate the Draconian federal paradigm advocated by the FCC.

As part of the FCC's suggestion to adopt explicit national rules, it tentatively concludes that it should adopt a single set of standards with which both arbitrated agreements and Bell Operating Companies' (BOCs) statements of generally available terms must comply. NPRM at ¶ 36. The FCC seeks comments on this tentative conclusion. The PUCO does not agree with the FCC's tentative conclusion that all Section 251 regulations that the FCC might implement should be equally applicable to arbitrated agreements and BOC statements of generally available terms. The PUCO believes that the FCC interconnection regulations would be applicable to BOC statements because Section 252(f)(1) explicitly states: "a Bell operating company may . . . file with a State commission a statement of the terms and conditions that such company generally offers within that State *to comply with the requirements of Section 251 and the regulations thereunder and the standards applicable under this Section.*" (Emphasis added). The PUCO agrees that the FCC interconnection regulations could be applicable to arbitrated agreements if the state commission fails to carry out its responsibility under Section 252 and the FCC assumes the state's jurisdiction. However, the FCC should not establish standards for arbitration by the states. If the FCC establishes standards by which the arbitrations are bound, the FCC is displacing the role of the states in conflict with the plain language of the 1996 Act. If Congress had intended the FCC regulations to come into play relative to arbitration proceedings, it would have included language similar to that found in Section 252(f)(2) relative to BOC statements of generally available terms. Since Congress did not include such language, the FCC should not bind the states to certain standards in the arbitration process.

With respect to the interstate versus intrastate jurisdiction issues, the FCC concludes that "[i]t would make little sense, in terms of economics,

technology, or jurisdiction, to distinguish between interstate and intrastate components for purposes of Sections 251 and 252." NPRM at ¶ 37. The FCC further argues that limiting its jurisdiction to interstate issues would allow states "to establish disparate guidelines for intrastate guidelines with no guidance from the 1996 Act." *Id.* In reaching its sweeping conclusion that state jurisdiction is obliterated by implication, the FCC does not rely upon the provisions of the 1996 Act. Instead, the FCC draws upon two statements made by individual legislators. *Id.*

Thus, the FCC's "legal" rationale regarding this threshold jurisdictional issue is that it "makes little sense" to recognize a distinction between interstate and intrastate interconnection and, therefore, the 1996 Act could not have intended to do so. It is not legally sufficient for the FCC to rely upon the broad Congressional intent to promote competition in support of its tentative conclusion that it has authority to preempt States in this area. *See Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-375 (1986) (the FCC cannot take preemptive action to advance broad federal policy where the effect is to disregard 47 U.S.C. Section 152(b)'s express jurisdictional limitation).[4] In reviewing the 1996 Act itself, however, it is clear that no such prescriptive effect was intended. As a related matter, the traditional "interstate" jurisdictional limitation of the FCC found in Section 47 U.S.C. 151(b) remains unchanged by the 1996 Act. With respect to the FCC's finding

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[4] It is true that the FCC can effectively preempt state regulation without an express statutory provision, where it is impossible to comply with both federal and state regulatory requirements due to inseverability of interstate and intrastate activities. *LSC*, 476 U.S. at 368. Neither inseverability nor the impossibility of "dual compliance" has been raised or demonstrated by the FCC in this NPRM. Instead, the FCC simply contends that jurisdictional separation would "make little sense, in terms of economics, technology, or jurisdiction." NPRM at ¶ 37. That ambiguous conclusion, even assuming the FCC's terse assumptions in this regard are accurate (which Ohio does not), does not address or satisfy the standard for preemption under *LSC*.

of broad preemptive Congressional interest, the 1996 Act generally repudiates the implied preemption approach taken by the FCC. The 1996 Act is quite clear in preempting states where it intended to do so, which it did not in Section 251.

As a starting point, Section 2(b) of the Communications Act of 1934 was not amended by the 1996 Act and still provides an express limitation on the FCC's jurisdiction that "nothing in this Act shall be construed to apply to or give the FCC jurisdiction with respect to: (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. Section 152(b). The FCC dismisses 47 U.S.C. Section 152(b)'s compelling jurisdictional limitation by concluding that Section 251 takes precedence by "squarely addressing therein the issues before us." NPRM at ¶ 39. However, it is not accurate that Section 251 squarely addresses the jurisdictional issue because there simply is no mention of intrastate services or preemption of states' authority over such matters in Section 251. In support of its conclusion that the states' intrastate authority is preempted by implication, the FCC reasons that "[b]ecause the statute explicitly contemplates that the states are to follow the FCC's rules, and because the FCC is required to assume the state commission's responsibilities if the state commission fails to act to carry out its Section 252 responsibilities, we believe that the jurisdictional role of each must be parallel." NPRM at ¶ 38. This reasoning is flawed.

Just because Section 252 requires states to follow FCC guidelines established under Section 251, it does not logically follow that the intrastate jurisdiction of states is preempted. More appropriately, if one keeps the express jurisdictional limitation of the FCC in mind when reading Sections 251 and 252 (utilizing a wholistic reading of the applicable statutes), the

obvious conclusion would be that the FCC's guidelines should relate to interstate issues and that states must actively follow those guidelines (or the FCC will assume responsibility for those interstate issues). It is entirely possible for the FCC to promulgate interconnection standards that apply to interstate services only, under which the states could operate for purposes of fulfilling their role under the 1996 Act (or be subject to the FCC further exercising its interstate jurisdiction). Contrary to the FCC's assumptions, there is nothing inherent in Sections 251 and 252 that necessitates a preemption of the states' intrastate jurisdiction.[5]

In attempting to further support its broad jurisdictional conclusion and subordinate the express jurisdictional limitation of 47 U.S.C. Section 152(b), the FCC offers the following assurance:

> We note that Sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority. Indeed, that Section 251 does not disturb state authority over local end user rates may explain why Congress saw no need to amend Section 2(b) expressly, whereas it did see such a need in its 1993 legislation establishing commercial mobile radio service (CMRS). In the 1993 legislation, Congress eliminated the authority of states to regulate the rates charged for CMRS and so may have felt that an express amendment to Section 2(b) would be especially helpful. We seek comment on these issues as well.

NPRM at ¶ 40 (footnote omitted). In essence, the FCC is concluding that, even prior to the 1996 Act, it had jurisdiction over all wholesale

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[5] If the FCC were to adopt its tentative conclusion that the jurisdictional role of the FCC and the respective states "must be parallel," it should, at a minimum, clarify that states have jurisdiction over both the interstate and intrastate aspects of interconnection in implementing such national guidelines and performing their arbitration duties under the 1996 Act.

telecommunications matters and interstate retail matters, whereas states only had retail (i.e., end user) jurisdiction over intrastate matters.

This argument begs the jurisdictional question and is without basis in Title 47 U.S.C. First, it cannot reasonably be concluded that interconnection matters are outside the scope of the jurisdiction reserved exclusively to states by Title 47 with respect to "charges, classifications, practices, services, facilities, or regulation for or *in connection with* intrastate communication service." 47 U.S.C. Section 152(b) (emphasis added). As a practical matter, interconnection between local providers overwhelmingly involves physical interconnection for purposes of transmitting intrastate communications. Further, the broad reservation of state power in 47 U.S.C. Section 152(b) clearly encompasses wholesale activity and relations between local providers. There simply is no legal basis to conclude that states only have jurisdiction over end user rate issues.[6] In reality, the FCC's regulatory jurisdiction encompasses interstate services, and is not defined by the wholesale/retail nature of the underlying transactions.

As noted above, the NPRM also attempts to distinguish the 1996 Act from the Omnibus Budget Reconciliation Act of 1993 [amending 47 U.S.C. Section 332] where Congress preempted state regulation of cellular rates and

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[6] Even the regulation of end user rate jurisdiction by states seems to be at risk in this NPRM. Although the FCC expressly assures states in this portion of the NPRM that the states' end-user rate authority is unaffected by Sections 251 and 252, the FCC subsequently seeks to entertain comments on whether it should issue a preemption order requiring that rates for local service exceed the cost of providing that service. NPRM at ¶ 188. Thus, it appears that even the obvious limitation on the FCC's authority fails to restrain the sweepingly preemptive approach taken in this NPRM. It is disturbing to see the FCC entertaining such illicit notions, particularly at a time when the FCC is supposed to be forging a new cooperative regulatory atmosphere with states under the 1996 Act. In this context, the FCC's assurances that it will proceed "with due regard to work already done by states" and "preserve broad discretion for states," NPRM at ¶¶ 26-27, offer little comfort absent a substantive approach in this NPRM that meaningfully recognizes the states' lawful authority and implements the affirmative state role contemplated in the 1996 Act.

made a corresponding change in 47 U.S.C. Section 152(b). In particular, the FCC asserts that, whereas Congress saw a need to amend 47 U.S.C. Section 152(b) in the context of preempting state regulation of cellular rates, it did not see a corresponding need in enacting Sections 251 and 252 because the FCC's authority under the 1996 Act does not affect end user rate regulation by states. NPRM at ¶40. The FCC's logic is clearly a "bootstrapping" argument and does not support the conclusion that the FCC has exclusive authority over wholesale matters. In fact, the 1993 amendments to 47 U.S.C. Section 32 clearly reserve to states the authority to regulate "other terms and conditions" including the responsibility of ensuring *wholesale* spectrum capacity for cellular resellers. H.R. Rep. No. 111, 103rd Cong., 1st Sess. 1 (1993). Thus, it is fallacious for the FCC to rely upon the 1993 amendments to 47 U.S.C. Section 332 in to support the notion that it has exclusive wholesale jurisdiction.[7]

More importantly, the implied preemption approach advocated by the FCC is directly prohibited by Congress under the 1996 Act. Section 601(c) of the 1996 Act clarifies that the 1996 Act "shall not be construed to modify, impair or supersede federal, state, or local law *unless expressly so provided in such Act or amendments.*" Section 601(c) of the 1996 Act (emphasis added).

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7 Unlike other federal agencies, Congress has simply not granted exclusive jurisdiction to the FCC regarding wholesale regulatory transactions. For example, the Federal Power Act, 16 U.S.C. 791, *et seq.*, specifically extends the Federal Energy Regulatory Commission's (FERC's) regulatory jurisdiction to the "sale of electric energy at wholesale" defined as a sale of electric energy to any person for resale. 16 U.S.C. § 824(b), (d) (1995). Hence, the FERC has exclusive jurisdiction over the rates of wholesale electric energy and agreements affecting such rates. The United States Supreme Court has issued a long series of decisions that have firmly established the preemptive effect of the Federal Power Act. For example, the Court has held that, in enacting the Federal Power Act, Congress clearly intended "to draw a bright line easily ascertained, between state and federal jurisdiction . . . by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Federal Power Commission v. Southern Edison Co.* , 376 U.S. 205, 215-216 (1964). Therefore, Congress knows how to vest a federal agency with wholesale rate authority where it wants to do so, and has not vested the FCC with wholesale telecommunications authority.

Through the enactment of Section 601(c), Congress has mandated that any preemption finding made under Title 47 should be based upon the express provisions therein. Congress knew when it wanted to preempt the states and did so expressly. *See, e.g.*, Sections 253(a) and 254(g) of the 1996 Act, (expressly referring to intrastate services). Through Section 601(c), Congress has specifically emphasized that preemptive intent should not be implied based upon corollary provisions or by inference. By contrast and inconsistent with this explicit Congressional directive, the FCC's jurisdictional conclusions in this NPRM are based *primarily* on inference and implication.

In addition to the firmly-stated prohibition against implied preemption, the Congress expressly crafted a "savings clause" applicable to state regulations, orders or policies relating to access and interconnection requirements, provided that the state requirement is consistent with the requirements of Section 251 and does not substantially prevent implementation of Section 251. Section 251(d)(3) of the 1996 Act. The NPRM buries the singular reference to this important savings clause in its discussion of pricing policies. NPRM at ¶ 157. Pursuant to Section 251(d)(3), the requirements of Section 251 are supposed to be the measure against which state access and interconnection requirements stand or fall, and should not be supplanted by the FCC substituting its detailed judgment for the states.

The legislative history relating to Section 251(d)(3) clearly indicates that intrastate jurisdiction is reserved to states in the context of Section 251 interconnection issues. The Joint Explanatory Statement of the Committee of Conference provides that:

> [N]othing in section 251 precludes a State from imposing requirements on telecommunications carriers with respect to *intrastate* services that the State determines are necessary to further competition in the provision of

> telephone exchange service or exchange access service, so long as any such requirements are not inconsistent with the Commission's rules to implement section 251.

S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) at 119. (emphasis added). The approach taken in the NPRM fails to give meaning to the state deference mandated by Congress.

Also with respect to threshold legal issues, the NPRM seeks comment on the impact of FCC's complaint jurisdiction under 47 U.S.C. Section 208 on the dual regulatory paradigm established under the 1996 Act. NPRM at ¶ 41. The FCC's complaint authority would plainly appear to encompass violations of Sections 251 and 252. However, the federal retention of its complaint authority does not in any way suggest or imply that the states' complaint authority is curtailed. The dual complaint system has coexisted for many years and there is nothing in the 1996 Act suggesting that the two remedies are no longer concurrent or that they suddenly conflict in some manner. In this regard, federal courts have held that the FCC's complaint authority does not preempt corollary state claims based on the same conduct. *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 633-634 (6th Cir. 1987). *See also,* 47 U.S.C. Section 414 (state remedies not displaced by Title 47 U.S.C.); *Louisiana PSC v. FCC,* 476 U.S. 355 (1986) (relying primarily upon 47 U.S.C. Section 152(b)). Therefore, states can continue to hear complaints regarding their arbitration orders, pursuant to state law. If the FCC wanted to make the state remedy exclusive, it could refrain from 47 U.S.C. Section 208 under its forbearance authority, while simultaneously making clear that complaint cases under Sections 251 and 252 will be enforced exclusively by the states.[8]

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[8] Such an approach would still reserve the FCC's opportunity to reassert enforcement authority *under Sections 251 and 252,* as is contemplated by those sections if a particular state were to fail to enforce those sections. Moreover, forbearing from 47 U.S.C. § 208 for this purpose would not prevent the FCC from proactively enforcing Sections 251 and 252 by